

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SUSAN L. ORR)	
Claimant)	
)	
VS.)	
)	
TRAINING & EVALUATION CENTER OF HUTCHINSON, INC.)	
Respondent)	
)	
AND)	
)	
ACCIDENT FUND GENERAL INSURANCE)	
Insurance Carrier)	

Docket No. 1,054,512

ORDER

Claimant requests review of the May 3, 2011 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

The Administrative Law Judge (ALJ) denied claimant's preliminary hearing request after finding that she failed to sustain her burden of proof of personal injury by accident arising out of and in the course of her employment with respondent. Specifically, the ALJ found claimant's workers compensation claim was precluded by the "going and coming rule" in K.S.A. 44-508(f).

The claimant requests review of this decision alleging that she was on a "special purpose" trip at the time of her accident. Thus, her resulting injury arose out of and in the course of her employment and is, therefore, compensable.

Respondent argues that the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

The ALJ's Preliminary Hearing Order succinctly and accurately sets forth the facts and circumstances surrounding this claim. This Board Member adopts that statement as her own.

The ALJ summarized his findings as follows:

Claimant slipped and fell on a sidewalk at her home, after starting her truck. She was not on a special errand for her employer, but was simply preparing to go to work in accordance with established inclement weather policy. She had not yet begun [sic] her duties for [r]espondent, and her claims are barred by the "Going and Coming Rule." See **K.S.A. 44-508(f)**.¹

Accordingly, the ALJ denied claimant's request for workers compensation benefits.

Claimant contends that because "she was on a special purpose trip at the direction of her supervisor due to the inclement weather", the ankle fracture she sustained on January 20, 2011, while walking back from starting her vehicle that morning, constitutes a compensable injury. Claimant maintains that "absent her supervisor's phone call at 6:50 a.m., [c]laimant would have gone to work at her normally scheduled work time, 8:30 a.m., and would have reported to her normally scheduled work location, the main street location [cite omitted]."² Claimant goes on to argue that "she was in a hurry due to her supervisor calling and waking her up only 20 to 25 minutes prior to her needing to report to the 27th Street residence. [cite omitted] Clearly, this was a special purpose trip at the direction of her supervisor."³

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

The "going and coming" rule contained in K.S.A. 2010 Supp. 44-508(f) provides in pertinent part:

¹ ALJ Order (May 3, 2011) at 1.

² Claimant's Brief at 3 (filed May 26, 2011).

³ *Id.*

The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

K.S.A. 2010 Supp. 44-508(f) is a codification of the “going and coming” rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.⁴ In *Thompson*, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

The rationale for the “going and coming” rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.⁵

But K.S.A. 2010 Supp. 44-508(f) contains exceptions to the “going and coming” rule. First, the “going and coming” rule does not apply if the worker is injured on the employer's premises.⁶ Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.⁷

Here, there is no dispute that claimant was not on respondent's “premises”. Rather, she was at her own apartment complex, readying her vehicle for the drive. The sidewalk had yet to be cleared and the ice and snow led to her fall and subsequent injury. At the moment of her injury claimant had yet to assume her work duties. While it is true that she had been told to report to a different location, pursuant to the respondent's inclement

⁴ *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

⁵ *Thompson v. Law Office of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

⁶ *Id.* at Syl. ¶ 1. Where the court held that the term “premises” is narrowly construed to be an area, controlled by the employer.

⁷ *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 907 P.2d 828 (1995).

weather policy, that directive did not, in this Member's view, transform her morning's activities walking to and from her car into a "special errand" or any sort of work-related activity. Like the ALJ, this Board Member finds that claimant's walk from her vehicle into her apartment to be encompassed by the "going and coming" rule set forth in K.S.A. 44-508(f). While it is unfortunate that she fell while making this walk, these facts do not support a finding of compensability.

Assuming, arguendo, the employer's request to report to another location might be considered a "special errand", even these facts do not support the application of the exception to the "going and coming" rule. Unlike the circumstances present in *Halford*⁸, this claimant had yet to assume the trip that claimant contends was a "special errand". She had yet to leave for the alternative location. In *Halford*, the employee was in his vehicle traveling to the shop to retrieve supplies. Here, claimant had started her car and was walking back into her apartment. She had not yet left her own premises. Thus, even the "special errand" exception does not provide coverage under the Act. For these reasons, the ALJ's Preliminary Hearing Order is affirmed in all respects.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁹ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated May 3, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2011.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

⁸ *Halford v. Nowak Const. Co.*, 39 Kan .App. 2d 935, 186 P.3d 206, *rev. denied* ____ Kan. ____ (2008).

⁹ K.S.A. 44-534a.